

**IN THE
COMMONWEALTH OF VIRGINIA
BOARD FOR CONTRACTORS**

Re: In the matter of the Virginia Contractor Transaction Recovery Act claim of Kelly Foster (Claimant) and John J. Barham, t/a Barham Builders (Regulant)

John J. Barham, t/a Barham Builders
Chesterfield, VA 23832

File Number 2009-03653
License Number 2705089046

FINAL OPINION AND ORDER

On October 14, 2009, the Summary of the Informal Fact-Finding Conference ("the Summary") and notification of the Board for Contractors ("the Board") December 8, 2009, meeting was mailed, via United Parcel Service ("UPS"), to Kelly Foster ("Foster") and to John J. Barham, t/a Barham Builders ("Barham Builders"), at the address of record. The claimant's mail was delivered. The regulant's mail was delivered.

On December 8, 2009, the Board met and reviewed the record, which consisted of the claim file, the transcript and exhibits from the Informal Fact-Finding Conference ("IFF") and the Summary. Kelly Foster appeared at the Board meeting. Barham Builders did not appear at the Board meeting in person or by counsel or by any other qualified representative.

The Board adopts the Claim Review, which contains the facts regarding the recovery fund claim in this matter, adopts the Summary, and amended the Recommendation. The Claim Review and Summary are incorporated as a part of this Order. The Board finds there is language in the order that supports the conclusion that the court found that the conduct of Barham Builders involved improper or dishonest conduct.

The Board **ORDERS** that this claim be approved for payment in the amount of \$15,048.00. The Board voted to pay the amount of court cost awarded in the judgment.

Upon payment of this claim, the license of Barham Builders will be **revoked** pursuant to Title 54.1, Chapter 11, Article 2, of the Code of Virginia.

Pursuant to 54.1-1123(B), payments may be reduced on a prorated basis based upon the number of claims received.

AS PROVIDED BY RULE 2A:2 OF THE SUPREME COURT OF VIRGINIA, YOU HAVE THIRTY (30) DAYS FROM THE DATE OF SERVICE (I.E. THE DATE YOU ACTUALLY RECEIVED THIS DECISION OR THE DATE THE DECISION WAS MAILED TO YOU, WHICHEVER OCCURRED FIRST) WITHIN WHICH TO APPEAL THIS DECISION BY FILING A NOTICE OF APPEAL, SIGNED BY EITHER YOU OR YOUR COUNSEL, WITH JAY W. DEBOER, SECRETARY OF THE BOARD FOR CONTRACTORS. IN THE EVENT THAT THE DECISION WAS SERVED ON YOU BY MAIL, THREE (3) DAYS SHALL BE ADDED TO THE THIRTY (30) DAY PERIOD.

SO ORDERED:

Entered this 8th day of December, 2009.

Board for Contractors

BY: _____

Jay W. DeBoer, Secretary

**IN THE
COMMONWEALTH OF VIRGINIA
BOARD FOR CONTRACTORS**

Re: Kelly L. Foster (Claimant) and John J. Barham t/a Barham Builders (Regulant)

**File Number: 2009-03653
License Number: 2705089046**

SUMMARY OF THE INFORMAL FACT-FINDING CONFERENCE

On August 18, 2009, the Notice of Informal Fact-Finding Conference ("Notice") was mailed, via United Parcel Service ("UPS"), to Kelly L. Foster ("Claimant") and John J. Barham t/a Barham Builders ("Regulant"). The Notice included the Claim Review, which contained the facts regarding the recovery fund claim. The claimant's mail was signed for and delivered. The regulant's mail was delivered. On the same date, the Notice was also mailed to Robert B. Hill, Counsel for the claimant. The mail was signed for and delivered.

On August 21, 2009, a letter was received from Robert B. Hill, Esquire advised that Mr. Hill had not been retained to represent the claimant in the matter of the Recovery Fund claim.

On September 18, 2009, an Informal Fact-Finding Conference ("IFF") was convened at the Department of Professional and Occupational Regulation.

The following individuals participated at the IFF: Kelly L. Foster, Claimant; Michele L. Atkinson, Staff Member; and Michael D. Redifer, Presiding Board Member.

Neither John J. Barham t/a Barham Builders, Regulant nor anyone on his behalf appeared at the IFF.

RECOMMENDATION

Based upon the evidence and the IFF, the following is recommended regarding the recovery fund claim:

Payment of the claim is based on "fraud" as cited on the Hopewell General District Court Warrant in Debt (Case Disposition/Judgment) dated April 23, 2008.

The claimant paid the regulant a total of \$10,200.00 to enclose an existing porch on her residence. The regulant began construction without obtaining a building permit. A county building inspector ordered the regulant to stop working. The regulant's work failed two subsequent footing inspections.

The claimant paid another contractor, James River Contractor, Inc., \$5,875.00 to remove the structure and restore the house.

During the IFF, the claimant explained that her actual out-of-pocket loss exceeded the \$15,000.00 awarded; however, she pursued recovery through the General District Court and was limited to a Judgment amount of \$15,000.00. Although the claimant expended more than \$15,000.00, reimbursement from the Recovery Fund can not exceed the Judgment amount.

The Judgment against the regulant includes court costs, but not attorney's fees. Virginia Code § 54.1-1123.C provides, "Excluded from the amount of any unpaid judgment upon which a claim against the Fund is based shall be any sums representing interest, or punitive or exemplary damages, or any amounts that do not constitute actual monetary loss to the claimants. Such claim against the Fund may (emphasis added) include court costs and attorneys' fees." Since attorneys' fees were not awarded in the Judgment, the fees are not being considered for reimbursement.

Therefore, I recommend the recovery fund claim be approved for payment in the amount of \$15,040.00:

\$15,000.00	Amount awarded in Judgment
+ 40.00	Court costs awarded in Judgment
<u>\$15,040.00</u>	

I further recommend that if, subsequent to the IFF, substantiation of payments to the claimants is received, that the Board adjusts the recommended amount herein accordingly.

By: Michael D. Redifer /mr
Michael D. Redifer
Presiding Board Member

Board for Contractors

Date: 10/14/09

CLAIM REVIEW

TO: Board for Contractors

FROM: Michele L. Atkinson
Legal Analyst

DATE: August 7, 2009

RE: In the matter of the Virginia Contractor Transaction Recovery Act Claim of Kelly L. Foster (Claimant) and John J. Barham t/a Barham Builders (Regulant)
File Number: 2009-03653

BACKGROUND

On April 23, 2008, in the Hopewell General District Court, Kevin Foster and Kelly Foster obtained a Judgment against John J. Barham t/a Barham Builders, in the amount of \$15,000.00 and costs in the amount of \$48.00.

A claim in the amount of \$17,608.00 was received by the Department of Professional and Occupational Regulation on April 14, 2009.

CLAIM FILE INFORMATION

Section 54.1-1120(A) requires the claimant to obtain a final judgment in a court of competent jurisdiction in the Commonwealth of Virginia against any individual or entity which involves improper or dishonest conduct.

The Warrant in Debt recites, "Breach of Contract/Fraud" as the basis for the suit and "fraud" as the basis for the award.

Section 54.1-1120(A) also requires the transaction occurring during a period when such individual or entity was a regulant and in connection with a transaction involving contracting.

The claimant entered into a written contract with Barham Builders on February 24, 2007, to enclose an existing rear porch. The contract was signed by John Barham. On October 1, 2007, the claimant and regulant entered into a second contract for the same project. The contract was signed by John Barham.

The Board issued a Class A, License Number 2705089046 to John J. Barham t/a Barham Builders on October 13, 2004.

The license was revoked on March 12, 2009.

Section 54.1-1120(A)(1) provides whenever action is instituted against a regulant by any person, such person shall serve a copy of the process upon the Board.

The Board for Contractors was not served prior to the claim being filed.

Section 54.1-1120(A)(2) states a copy of any pleading or document filed subsequent to the initial service process in the action against a regulant shall be provided to the Board.

The Board for Contractors did not receive pleadings and/or documents prior to the claim being filed.

Section 54.1-1120(A)(3) requires a verified claim to be filed no later than twelve months after the judgment becomes final.

A Judgment was entered on April 23, 2008. The claim was received on April 14, 2009.

Section 54.1-1120(A)(4) states the claimant shall be an individual whose contract with the regulant involved contracting for the claimant's residence.

The claimant entered into a written contract with Barham Builders on February 24, 2007, to enclose an existing rear porch. The contract was signed by John Barham. On October 1, 2007, the claimant and regulant entered into a second contract for the same project. The contract was signed by John Barham.

Section 54.1-1120(A)(5) prohibits recovery when the claimant is an employee of such judgment debtor, vendor of such judgment debtor, another licensee, the spouse or child of such judgment debtor nor the employee of such spouse or child, or any financial or lending institution nor anyone whose business involves the construction or development of real property.

On the Claim Form, the claimant was asked: Are you a vendor of the regulant (contractor)? Are you an employee, spouse or child of the regulant (contractor) or an employee of such spouse or child? Do you hold, or have you ever held, a Virginia Class A or Class B State Contractor's license or registration? Do you operate as a financial or lending institution? Does your business involve the construction or development of real property? Claimant answered, "No".

Section 54.1-1120(A)(6) states no directive from the fund shall be entered until the claimant has filed with the Director's Office a verified claim containing the following statements: (a) that the claimant has conducted debtor's interrogatories to determine

whether the judgment debtor has any assets which may be sold or applied in satisfaction of the judgment; (b) a description of the assets disclosed by such interrogatories; (c) that all legally available actions have been taken for the sale, or application of the disclosed assets and the amount realized therefrom; and (d) the balance due the claimant after the sale or application of such assets.

Debtor's interrogatories were conducted. No assets were revealed.

Section 54.1-1120(A)(7) states a claimant shall not be denied recovery from the Fund due to the fact the order for the judgment filed with the verified claim does not contain a specific finding of "improper and dishonest conduct." Any language in the order that supports the conclusion that the court found that the conduct of the regulant involved improper or dishonest conduct may be used by the Board to determine eligibility for recovery from the Fund.

The Warrant in Debt recites, "Breach of Contract/Fraud" as the basis for the suit and "fraud" as the basis for the award.

In the Affidavit of Facts dated April 10, 2009, the claimant asserts that on February 24, 2007, she entered into a contract with the regulant. The work was to be completed on or before March 31, 2007. The claimant paid the regulant a total of \$10,200.00: \$5000.00 by cashier's check number 4644015381 dated February 26, 2007, and \$5,200.00 in cash on March 15, 2007, pursuant to receipt number 572351.

The claimant asserts the regulant began working without having obtained a building permit and a couple weeks after the work began an inspector appeared requesting the building permit. The regulant was directed to immediately stop working. The regulant obtained a building permit on June 15, 2007, and an electrical permit on June 18, 2007.

On October 1, 2007, the claimant and regulant entered into a second contract with the regulant for the same project. On October 19, 2007, the regulant failed a footing inspection. The inspector noted, "Footings need to be continuous & 2 #4 rebars per drawings." In November of 2007, the regulant failed another footing inspection. After the last failed inspection, the claimant and her husband asked the regulant not to return to their home unless he was going to build according to the code. In a letter dated December 18, 2007, sent to the regulant by Counsel for the claimant and her husband, the regulant was advised that the claimant would be willing to discuss his prompt (three weeks) completion of the project and asked him to directly contact the claimant and her husband. The claimant asserts the regulant never responded.

On February 9, 2008, the claimant hired James River Contractor Inc. to demolish the structure to prepare the house to be rented due to a change

in their military duty station effective May of 2008. The claimant paid James River Contractor Inc. \$5,875.00 for the demolition work.

SECTION 54.1-1120(B) requires if the regulant has filed bankruptcy, the claimant shall file a claim with the proper bankruptcy court. If no distribution is made, the claimant may then file a claim with the Board.

On the Claim Form, the claimant was asked if, to their knowledge, the regulant had filed for bankruptcy? In response to this question, the claimant responded, "No".

SECTION 54.1-1123(C) excludes from the amount of any unpaid judgment any sums representing interest, or punitive or exemplary damages.

The Claim does not include interest or damages.